

Message Text

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ORIGIN L-03

INFO OCT-01 EA-10 ISO-00 SP-02 ICA-11 AID-05 EB-08
NSC-05 TRSE-00 SS-15 STR-07 OMB-01 CEA-01 HA-05
COME-00 CIAE-00 INR-10 NSAE-00 OPIC-03 XMB-02
/089 R

DRAFTED BY L/EB:GALEHNER:ER
APPROVED BY L:LMARKS
EA/J-C.MCDONALD

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P 022009Z AUG 78
FM SECSTATE WASHDC
TO AMEMBASSY TOKYO PRIORITY

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E.O. 11652:

TAGS:ETRD, EINV, JA

SUBJECT: U.S.-JAPAN FRIENDSHIP, COMMERCE
NAVIGATION FCN TREATY

1. THE DEPARTMENT HAS BEEN REQUESTED BY THE EQUAL EMPLOY-
MENT OPPORTUNITY COMMISSION (EEOC) TO PROVIDE AN INTERPRE-
TATION OF THE 1953 FCN TREATY WITH JAPAN TO ASSIST THE
EEOC IN PREPARING AN AMICUS BRIEF FOR THE CASE OF
AUGLIANO V. SUMITOMO SHOJI AMERICA, INC., CURRENTLY PENDING
IN THE SOUTHERN DISTRICT OF NEW YORK.

2. SECRETARIAL EMPLOYEES OF SUMITOMO, A NEW YORK CORPORA-
TION (WHOLLY-OWNED BY SUMITOMO SHOJI JAPAN) HAVE BROUGHT
SUIT UNDER TITLE VII OF THE 1964 CIVIL RIGHTS ACT, CLAIMING
SEX AND NATIONAL ORIGIN DISCRIMINATION IN THE COMPANY'S
HIRING, PROMOTION AND TRAINING PRACTICES. THE COMPANY HAS
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ANSWERED THAT THE FCN TREATY WITH JAPAN GIVES IT AN
EXEMPTION FROM AMERICAN CIVIL RIGHTS LAWS IN FILLING ITS
MANAGEMENT POSITIONS.

3. THE POSITION THE DEPARTMENT TAKES IN THIS CASE MAY HAVE
BROAD IMPLICATIONS FOR AMERICAN BUSINESSES OPERATING IN
JAPAN UNDER THE FCN TREATY, AND POSSIBLY FOR AMERICAN

BUSINESSES IN ALL COUNTRIES WITH WHICH THE U.S. HAS FCN

TREATIES CONTAINING PROVISIONS SIMILAR TO THOSE IN THE
JAPANESE TREATY.

4. THE KEY PROVISION OF THE FCN TREATY IN ISSUE IS
ARTICLE VIII, PARAGRAPH 1. IT PROVIDES IN PART THAT:
"NATIONALS AND COMPANIES OF EITHER PARTY SHALL BE
PERMITTED TO ENGAGE WITHIN THE TERRITORIES OF THE OTHER
PARTY, ACCOUNTANTS AND OTHER TECHNICAL EXPERTS, EXECUTIVE
PERSONNEL, ATTORNEYS, AGENTS, AND OTHER SPECIALISTS OF
THEIR CHOICE." DEPENDENTS (SUMITOMS) ARGUE THAT THIS
ARTICLE GIVES THEM THE RIGHT TO HIRE WHOMEVER THEY CHOSE
IN TREATY-TRADER POSITIONS. PLAINTIFFS (THE SECRETARIAL
EMPLOYEES) ARGUE THAT THAT THE RIGHT IS CONDITIONED BY
THE 1964 CIVIL RIGHTS WHICH FORBIDS DISCRIMINATION ON
THE BASIS OF SEX AND NATIONAL ORIGIN.

5. DEPARTMENT WOULD APPRECIATE YOUR ASSISTANCE IN PRO-
VIDING ANY INFORMATION YOU MAY HAVE CONCERNING JAPANESE
PRACTICE WITH REGARD TO THIS PROVISION OF THE FCN TREATY.
SPECIFICALLY, WE ARE INTERESTED IN KNOWING

A) HOW DOES GOJ ACCOMODATE REQUESTS BY AMERICAN
BUSINESSES TO EMPLOY AMERICAN NATIONALS AS
TREATY TRADERS WITHIN JAPAN?
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B) WHAT CONDITIONS, IF ANY, ARE PLACED ON THE RIGHT
OF U.S. BUSINESSES OPERATING IN JAPAN TO HIRE
EXECUTIVE PERSONNEL OF THEIR CHOICE?

6. WHAT WOULD BE THE EFFECT, IF ANY, ON AMERICAN BUSI-
NESSES IN JAPAN IF:

A) THE TREATY WERE INTERPRETED TO DISTINGUISH
BETWEEN AMERICAN BUSINESSES OPERATING THROUGH
BRANCH OFFICES AND THOSE DOING BUSINESS
THROUGH LOCAL SUBSIDIARIES, ACCORDING AN
ABSOLUTE RIGHT TO ENGAGE AMERICAN NATIONALS
AS TREATY TRADERS ONLY TO AMERICAN COMPANIES
OPERATING THROUGH BRANCH OFFICES?

B) THE TREATY WERE INTERPRETED TO PROVIDE A
"RIGHT OF CHOICE" SUBJECT TO THE REQUIREMENT
THAT AMERICAN BUSINESSES (WHETHER THROUGH
BRANCH OR SUBSIDIARY) GIVE EQUAL CONSIDERATION
TO LOCAL CITIZENS AS WELL AS AMERICAN NATIONALS
WHEN FILLING POTENTIAL TREATY TRADER JOB

POSITIONS IN THE HOST COUNTRY?

7. HAS THE GOJ ADOPTED A POSITION ON HOW THIS PROVISION

SHOULD BE INTERPRETED? EMBASSY MAY WISH TO CONTACT
INFORMALLY APPROPRIATE GOJ OFFICIALS TO SOUND THEM OUT
ON THIS SUBJECT.

8. WE WOULD ALSO LIKE TO KNOW IF ANY ACTIONS HAVE BEEN
TAKEN IN RESPONSE TO A NOVEMBER, 1975 INSPECTORS
MEMORANDUM NOTING DIFFERENCES BETWEEN JAPANESE AND
AMERICAN PRACTICE IN ISSUING TREATY TRADER (E) VISAS.
(INSPECTORS MEMORANDUM NO. 3, "THE CONDUCT OF RELATIONS
WITH JAPAN," POST: TOKYO AND CONSTITUENT POSTS, AT P. 3).
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THE MEMORANDUM STATES THAT THE JAPANESE PLACE NUMERICAL
LIMITATIONS UPON THE NUMBER OF TREATY TRADERS AMERICAN
FIRMS MAY BRING TO JAPAN, IT ALSO STATES THAT THE
JAPANESE REFUSE TO ISSUE TREATY TRADER VISAS TO AMERICANS
DOING BUSINESS IN JAPAN AS SOLE PROPRIETORS AND TO
EMPLOYEES OF AMERICAN-OWNED JAPANESE COMPANIES. ARE
THESE OBSERVATIONS STILL CORRECT? IF SO, HAS AMERICAN
PRACTICE BECOME MORE RESTRICTIVE TO PARALLEL JAPANESE
PRACTICE? HAVE ANY DISCUSSIONS WITH JAPANESE TAKEN PLACE
ABOUT THIS ISSUE?

9. DEPARTMENT WOULD APPRECIATE YOUR RESPONSE AS SOON
AS POSSIBLE SINCE DEPARTMENT FACES TIGHT SCHEDULE IN
RESPONDING TO EEOC REQUEST FOR OPINION. VANCE

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Message Attributes

Automatic Decaptioning: X
Capture Date: 01 jan 1994
Channel Indicators: n/a
Current Classification: UNCLASSIFIED
Concepts: AMITY, AGREEMENT
Control Number: n/a
Copy: SINGLE
Draft Date: 02 aug 1978
Decaption Date: 01 jan 1960
Decaption Note:
Disposition Action: RELEASED
Disposition Approved on Date:
Disposition Case Number: n/a
Disposition Comment: 25 YEAR REVIEW
Disposition Date: 20 Mar 2014
Disposition Event:
Disposition History: n/a
Disposition Reason:
Disposition Remarks:
Document Number: 1978STATE194974
Document Source: CORE
Document Unique ID: 00
Drafter: GALEHNER:ER
Enclosure: n/a
Executive Order: N/A
Errors: N/A
Expiration:
Film Number: D780316-0850
Format: TEL
From: STATE
Handling Restrictions: n/a
Image Path:
ISecure: 1
Legacy Key: link1978/newtext/t197808106/aaaadkvh.tel
Line Count: 150
Litigation Code IDs:
Litigation Codes:
Litigation History:
Locator: TEXT ON-LINE, ON MICROFILM
Message ID: 86f68a58-c288-dd11-92da-001cc4696bcc
Office: ORIGIN L
Original Classification: LIMITED OFFICIAL USE
Original Handling Restrictions: n/a
Original Previous Classification: n/a
Original Previous Handling Restrictions: n/a
Page Count: 3
Previous Channel Indicators: n/a
Previous Classification: LIMITED OFFICIAL USE
Previous Handling Restrictions: n/a
Reference: n/a
Retention: 0
Review Action: RELEASED, APPROVED
Review Content Flags:
Review Date: 05 may 2005
Review Event:
Review Exemptions: n/a
Review Media Identifier:
Review Release Date: N/A
Review Release Event: n/a
Review Transfer Date:
Review Withdrawn Fields: n/a
SAS ID: 1557557
Secure: OPEN
Status: NATIVE
Subject: U.S.-JAPAN FRIENDSHIP, COMMERCE NAVIGATION FCN TREATY
TAGS: ETRD, EINV, JA
To: TOKYO
Type: TE
vdkgvwkey: odb://SAS/SAS.dbo.SAS_Docs/86f68a58-c288-dd11-92da-001cc4696bcc
Review Markings:
Sheryl P. Walter
Declassified/Released
US Department of State
EO Systematic Review
20 Mar 2014
Markings: Sheryl P. Walter Declassified/Released US Department of State EO Systematic Review 20 Mar 2014